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IN THE

Supreme Court of the United States

OCTOBER TERM, 1938.

No. 329

GENE BUCK, Individually and as President of the American Society of Composers, Authors and Publishers, *et al.*,
Appellants,

v.

PHIL H. GALLAGHER, Individually and as State Treasurer of the State of Washington, *et al.*,
Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON.

ANSWER OF APPELLANTS TO MOTION OF APPELLEE G. W. HAMILTON TO DISMISS THE APPEAL.

THOMAS G. HAIGHT,
LOUIS D. FROHLICH,
HERMAN FINKELSTEIN,
Counsel for Appellants.

APPELLATE LAW PRINTERS, INC., 103 Lafayette Street, N. Y.
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Appellants,

v.

PHIL H. GALLAGHER, Individually and as State Treasurer of the State of Washington, *et al.*,

Appellees.

ANSWER OF APPELLANTS TO MOTION OF APPELLEE G. W. HAMILTON TO DISMISS THE APPEAL.

Appellants, Gene Buck, individually and as President of the American Society of Composers, Authors and Publishers, Carl Fischer, Inc., G. Schirmer, Inc., Irving Berlin, Inc., Deems Taylor, Oley Speaks, William J. Hill, Anne Paul Nevin, Ella Herbert Bartlett and Jane Sousa, answering the motion of appellee G. W. Hamilton, Attorney General of the State of Washington to dismiss the appeal herein, respectfully show:

1. This answer will present both the facts and the law relating to appellee's motion.

2. The motion to dismiss herein is based upon three grounds, to wit: (a) That the Governor of the State of Washington has not been made a party and is allegedly an indispensable party; (b) That certain state and county officers sued as defendants herein had ceased to hold office prior to or during the pendency of this action, and that their successors have not been substituted; (c) That no citation on appeal has been served upon the Attorney General of the State of Washington, or upon his attorney. Each of these matters will be taken up in succession.

3. The Governor of the State of Washington was not an indispensable party defendant for the following reasons:

(a) Under Section 266 of the Judicial Code (Tit. 28 U. S. C., §380) it is not necessary to make the Governor a party. That section merely requires that the application for a temporary injunction "shall not be heard or determined before at least five days' notice of the hearing has been given to the Governor and to the Attorney General of the State, and to such other persons as may be defendants in the suit."

(b) Copies of the notice of hearing of the application for temporary injunction pursuant to Section 266 of the Judicial Code, together with the complaint, motion papers and order of the District Court dated June 9, 1937, directing such hearing were served on the Governor of Washington on June 12, 1937 (17 days before the date fixed for hearing the motion for interlocutory injunction). Such notice and order are made a part hereof as Exhibits "1" and "2", respectively.* They appear in the transcript at pp. 234-238.

*All exhibits are bound in a separate volume submitted herewith and made a part hereof.

The affidavit of service of such papers is annexed hereto as Exhibit "3".

(c) The moving papers admit that due notice was given, but they complain that there is a defect of parties because the Governor was not made a party defendant. Appellee relies on Article III of the Washington State Constitution which imposes on the Governor the obligation to *"see that the laws are faithfully executed,"* this language having been substantially copied from Article II, Section 3 of the Federal Constitution which charges the President of the United States with the same duty. It has long been held, however, that superior officers charged with a *general* duty of supervising law enforcement need not be made parties defendant where the officer charged with *actual* enforcement of a statute is before the court. *Colorado* v. *Toll*, 268 U. S. 228, 230; *Ryan* v. *Amazon Petroleum Corp.*, 71 F. (2d) 1, 4 (injunction granted 293 U. S. 388); *Berdie* v. *Kurtz*, 75 F. (2d) 898 (C. C. A. 9); *Darger* v. *Hill*, 76 F. (2d) 198 (C. C. A. 9); *Yarnell* v. *Hillsborough Packing Co.*, 70 F. (2d) 435 (C. C. A. 5); *Consolidated Freight Lines* v. *Pfost*, 7 F. S. 629, 630 (D. C. Idaho); *Consolidated Gas Co.* v. *Hardy*, 14 F. S. 223, 225 (S. D. N. Y.); *Chester C. Fosgate Co.* v. *Kirkland*, 19 F. S. 152, 156, 158 (S. D. Fla.); *cf. Ickes* v. *Fox*, 300 U. S. 82, 96-7. In any event the objection that there is a defect of parties is addressed to the discretion of the Court and not to its jurisdiction. *Rood* v. *Goodman*, 83 F. (2d) 28, 32 (C. C. A. 5).

(d) Appellee relies on *Arneson* v. *Denny*, 25 F. (2d) 993 (D. C. Wash.), and *State ex rel Reed* v. *Gormley*, 40 Wash. 601, to support his claim that the Governor should be made a party defendant. In the *Arneson* case, the notice to the Governor was held insufficient because it did not inform him of the particular law as to which enforcement was sought to be enjoined, nor of the particular official

acts sought to be enjoined, nor on what grounds such law was claimed to be unconstitutional; nor was the Governor served with the order of the court setting the motion down for hearing; nor were the complaint or the motion papers served upon him. In the case at bar, the notice to the Governor was full and complete (Ex. "1", Tr. 234). The order setting the case down for hearing on the motion for interlocutory injunction (Ex. "2", Tr. 210), as well as the bill of complaint and motion papers were served upon the Governor, together with the notice (affidavit of service, Ex. "3").

(e) Appellants herein followed the procedure approved by a statutory court in *Consolidated Freight Lines* v. *Pfost*, 7 F. Supp. 629, 630 (D. C. Idaho), where the court distinguished the *Arneson* case on the ground that the statutory notice there was insufficient. Section 266 of the Judicial Code does not require that the Governor be made a party, nor did the order of Judge CUSHMAN, directing service upon the Governor of the complaint and moving papers, require that the Governor be made a party.

(f) *State ex rel. Reed* v. *Gormley*, 40 Wash. 601, upon which appellee relies, is not in point. There, an action was brought to restrain the board of county commissioners from honoring certain warrants theretofore issued by them. The person to whom the warrants were originally issued was made a defendant, but prior to the commencement of the action the warrants had been transferred and the transferees were not made parties. The court dismissed the action, on the ground that the present holders of the warrants were indispensable parties defendant because the action sought to affect their property rights. In the case at bar, there is no attempt to affect any rights whatsoever of the Governor of the State of Washington, as the above cases clearly show.

Since the bill of complaint does not allege any cause of action against the Governor, it is not necessary to make him a party. *Mechanics' Bank* v. *Seton*, 1 Pet. 299, 306.

(g) The moving appellee made a motion in the court below to dismiss the complaint herein, on the grounds that the court below lacked jurisdiction, that there was a *mis*-joinder of parties plaintiff, and that the complaint failed to show facts sufficient to entitle complainants to equitable relief (Ex. "5", Tr. 285-290). But no claim of *non*-joinder of parties *defendant* was made in that motion. Accordingly, any objection on that ground has been waived. In any event, since the defect of parties, if any, existed before the decree below was entered, the objection cannot be raised for the first time on appeal. *International News Service* v. *Associated Press*, 248 U. S. 215, 233 (1918); *cf.* Equity Rule 44.

(h) The Governor of the State of Washington does not appear upon this motion and does not claim any prejudice by reason of appellants' failure to make him a party defendant.

4. The claim of appellee G. W. Hamilton that the present State Treasurer Phil H. Gallagher is not a party defendant-appellee is without merit for the following reasons:

(a) Although Otto Case was originally named as a defendant as the State Treasurer of the State of Washington, appellants learned after the complaint and motion papers were served on the other defendants that Otto Case had been succeeded in the office of State Treasurer by Phil H. Gallagher.

(b) This matter was called to the attention of Alfred Schweppe, Esq., counsel for the defendants, and it was agreed that Phil H. Gallagher could be served as a defendant under the designation "John Doe". Subsequently, a notice of appearance was entered on behalf of Phil H.

Gallagher, his name having been substituted by the *defendants'* counsel in such notice of appearance in place and stead of Otto Case as State Treasurer of Washington. (Such notice of appearance is annexed hereto as Exhibit "4", and appears in the transcript at pp. 545-6).

(c) The Attorney General was a party to that notice of appearance, individually and by several other attorneys, including Alfred J. Schweppe, Esq., who actively conducted this litigation throughout on behalf of the Attorney General and all the other defendants-appellees in this case.

(d) Thereafter, the defendants, including the Attorney General, moved to dismiss the complaint herein (Tr. 285-290). Said motion is annexed hereto as Exhibit "5". The caption of that motion includes "Phil H. Gallagher, as State Treasurer of Washington", among the defendants (Tr. 285).

(e) The notice under Rule 12, paragraph 2 of the Rules of this Court contains an acknowledgment of service on August 4, 1938, by Alfred J. Schweppe, Esq., as *counsel for "Phil H. Gallagher, sued herein as 'John Doe'"*, among others (Tr. 543). A copy of said notice under Rule 12, together with the acknowledgment of service is made a part hereof as Exhibit "6".

(f) The answer filed in this Court by appellees in opposition to appellants' Statement as to Jurisdiction (Exhibit "7" hereto annexed) is signed by counsel as "Solicitors and Attorneys for Appellees" (Tr. 555). Phil H. Gallagher was included as one of the appellees.

(g) The citation on appeal is directed to Phil H. Gallagher, among other defendants (Tr. 552). A copy of such citation is annexed hereto as Exhibit "8".

(h) Until this motion was made there was no suggestion or hint that Phil H. Gallagher was not a party defendant-appellee in this action.

5. The failure to bring in Lynn G. Gimmell, successor to defendant-appellee Sam M. Driver, as District Attorney of Chelan County as a party defendant does not abate the action as to the remaining defendants-appellees.

(a) Sam Driver was named as a defendant-appellee as the District Attorney for Chelan County. It now appears in the motion papers herein that said Sam Driver resigned his position as District Attorney, and was succeeded by one Lynn G. Gimmell on April 1, 1937, prior to the commencement of this action.

(b) Appellants and their counsel did not know of the resignation of said Sam M. Driver, and were led to believe that he was still the District Attorney of Chelan County when this action was instituted by reason of the fact that an appearance was entered on his behalf by Alfred J. Schweppe, Esq., and the other attorneys in this case, such notice of appearance having been filed in the court below on June 28, 1937 (Tr. 545-6). *The name "Sam M. Driver" is listed as one of the defendants in the caption of such notice of appearance, and the notice is on behalf of all defendants.*

(c) The same applies to the motion to dismiss the complaint filed in the court below made on behalf of all defendants, including said Sam M. Driver (Tr. 285-290).

(d) The citation on appeal likewise is directed to said Sam M. Driver (Tr. 552, Exhibit "8" hereof), and service of the notice under Rule 12 of the Rules of this Court is acknowledged by said Alfred J. Schweppe, Esq., as counsel for Sam M. Driver, among others (Tr. 542, at 543).

(e) It is now stated for the first time that the attorneys for the defendants-appellees were not authorized to appear on behalf of said Sam M. Driver because of his resignation and the appointment of a successor as District Attorney of Chelan County prior to the commencement of this action.

It is too late now to substitute Mr. Driver's successor in office under Section 11 of the Act of February 13, 1925 (Tit. 28 U. S. C., §780), Rule 19, Subdivision 4 of the Rules of this Court and Rule 25, Subdivision (d) of the New Rules of Civil Procedure, since more than six months have elapsed since the appointment of such successor.

(f) The State Statute of the State of Washington against which the enforcement of this action is directed (Session Laws of Washington, 1937, Chapter 218, pp. 1070-1085, inclusive), imposes the duties of enforcement on the prosecuting attorneys of the several counties where offenses under the Statute may have been committed.

(g) The presence of Sam M. Driver as a defendant is not necessary in order to determine the controversy or do justice between appellants and the appellees, other than said Sam M. Driver.

(h) Under the circumstances, it is respectfully urged that said Sam M. Driver be dropped from this action under Rule 21 of the New Rules of Civil Procedure, and that this action and this appeal continue without him since he is not an indispensable party.

6. The failure to bring in Lloyd L. Wiehl, successor to defendant-appellee John D. Evans, as District Attorney of Yakima County as a party defendant does not abate the action as to the remaining defendants-appellees.

(a) The affidavit submitted in support of the motion to dismiss, states that defendant-appellee John D. Evans, referred to in this suit as District Attorney of Yakima County, was never at any time such District Attorney, and that at the time of the commencement of this action one *Robert J. Willis* was District Attorney of Yakima County and was succeeded on September 7, 1937, by Lloyd L. Wiehl (Motion to Dismiss, p. 8).

(b) The notice of appearance referred to above which was entered by the "Solicitors and Attorneys for the Defendants", substituted Robert J. Willis in the title of the action as the District Attorney of Yakima County in place of said John D. Evans. This substitution was not noticed by counsel for complainants-appellants, and all subsequent papers in the case, including defendants' motion to dismiss the complaint in the court below, included the name "John D. Evans" in the caption as District Attorney of Yakima County (see Tr. 285-290).

(c) Alfred J. Schweppe, Esq., acknowledged service of the notice under Rule 12 on behalf of the appellees, including "John D. Evans, as District Attorney of Yakima County of Washington" (Tr. 543).

(d) Since it now appears that John D. Evans is not the District Attorney of Yakima County and that more than six months have elapsed since the appointment of Lloyd L. Wiehl as such District Attorney on September 7, 1937, we respectfully urge that said John D. Evans be dropped from this action.

(e) As in the case of the said appellee Sam M. Driver, District Attorney of Chelan County, the presence of John D. Evans or of Lloyd L. Wiehl is not necessary to make a proper determination of the controversy between appellants and the remaining appellees.

7. The failure to bring in Belle Reeves, successor to defendant-appellee Ernest N. Hutchinson, as Secretary of State of the State of Washington as a party defendant does not abate the action as to the remaining defendants-appellees.

(a) Defendant-appellee Ernest N. Hutchinson died on January 30, 1938, according to the affidavit submitted in support of the motion to dismiss this appeal, and was succeeded by one Belle Reeves and qualified on February 7, 1938 (pp. 8-9).

(b) No Suggestion of Death was filed, and counsel for appellants did not become aware of the death of said Ernest N. Hutchinson until receiving a copy of said affidavit of John Egan Belcher on or about October 11, 1938.

(c) Since more than six months have elapsed since the death of Ernest N. Hutchinson and the appointment of his successor, it is now too late to bring in such successor under Section 11 of the Act of February 13, 1925 (Tit. 28 U. S. C. §780), Rule 19, Subdivision 4 of the Rules of this Court and Rule 25, Subdivision (d) of the New Rules of Civil Procedure.

(d) The only duties imposed by the Statute upon the Secretary of State are ministerial. The lists of copyrighted works required under Sections 4 and 5 of the State Statute must be filed in the office of the Secretary of State who shall make them available for public examination, and may publish the same in newspapers. Wherever service of process is made under the Statute on non-residents, a copy thereof must be filed in the office of the Secretary of State. The Secretary of State has no power to enforce the Statute.

(e) Since the sole object of this suit is to restrain *enforcement* of the Statute, the Secretary of State is not an indispensable or even a necessary party, and this suit and the appeal herein should proceed in his absence.

8. The claim that neither appellee, G. W. Hamilton, Attorney General, nor his attorney were served with the citation on appeal herein is unfounded for the following reasons:

(a) Throughout all the proceedings herein the Attorney General was represented by Special counsel, *Alfred J. Schweppe, Esq.*, who actively conducted the defense of this action on his behalf, made all the arguments on behalf of the Attorney General in open court, and acted on behalf of the Attorney General in serving and accepting papers in this suit.

(b) Mr. Schweppe not only represented the Attorney General of the State of Washington in this suit, but he also represented the Attorney General and other officers of the State of *Montana* in a suit by these same appellants, challenging the validity of a similar statute enacted in that State (ch. 90 Laws of Montana, 1937). The main argument on behalf of the defendants in opposition to the motion for a temporary injunction to restrain the enforcement of the Montana Statute was made by Mr. Schweppe on April 23, 1937, before a court consisting of Honorable Bert Emory Haney, Circuit Judge, Honorable Charles N. Pray and Honorable James H. Baldwin, District Judges.*

(c) Under the circumstances, appellants were justified in relying upon the authority of Mr. Schweppe to represent the appellee, Hon. G. W. Hamilton, Attorney General of the State of Washington, as well as the other appellees.

(d) The notice of appearance filed in the court below on June 28, 1937, is signed by Alfred J. Schweppe, Esq., among others, as solicitor and attorney for all the defendants (Tr. 545-6).

(e) The motion to dismiss on behalf of all the defendants is signed by Alfred J. Schweppe, Esq., among others, as solicitor and attorney for all the defendants (Tr. 285-290).

(f) At the hearing held on February 9, 1938, in the court below with reference to the question of jurisdiction, the only person representing the defendants, other than the intervening defendants, was said Alfred J. Schweppe, Esq. (Tr. 331, Exhibit "9", hereto annexed).

(g) The citation on appeal and other papers on appeal were served on Alfred J. Schweppe, Esq., as attorney for all the defendants, other than the intervening defendants (Tr. 552-54, Affidavit of Service, made a part hereof as Exhibit "10").

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* The United States District Court for Montana has not yet decided the motion for interlocutory injunction argued April 23, 1937 (*Carl Fischer, Inc.* v. *Shannon*, D. C. Mont. Docket No. 1537).

(h) Said Alfred J. Schweppe, Esq., acknowledged service of the notice under Rule 12 as attorney for "G. W. Hamilton, as Attorney General for the State of Washington," among others (Tr. 542-4, at 543, Exhibit "6", hereof).

This admission reads as follows (Italics ours):

"Service acknowledged this 4 day of August, 1938.

[Signed] ALFRED J. SCHWEPPE
Counsel for Appellees Cliff Yelle, as State Auditor of Washington; *Ernest N. Hutchinson, as Secretary of the State of Washington; G. W. Hamilton, as Attorney General for the State of Washington;* R. Gray Warner, as District Attorney of King County of Washington; Harry H. Johnston, as District Attorney of Pierce County of Washington; Ralph E. Foley, as District Attorney of Spokane County of Washington; A. W. Swanson, as District Attorney of Snohomish County of Washington; H. W. Covalt, as District Attorney of Whatcom County of Washington; Smith Troy, as District Attorney of Thurston County of Washington; Paul O. Manley, as District Attorney of Grays Harbor County of Washington; *John D. Evans, as District Attorney of Yakima County of Washington;* Glenn L. Bean, as District Attorney of Walla Walla County of Washington; *Sam M. Driver, as District Attorney of Chelan County of Washington; Phil H. Gallagher, sued herein as "John Doe".*

[Signed] C. C. DILL,
KENNETH DAVIS,
LEO TEATS,
Counsel for Appellee by LEO TEATS,
K. M. O. Inc.

[Signed] CLARK R. BELKNAP,
Counsel for Appellee John G. Lockhart."

(i) The stipulation with respect to the record on appeal is signed by Alfred J. Schweppe, Esq., and his firm, McMicken, Rupp & Schweppe, as "Counsel for defendants-appellees" without limitation (Tr. 547, at 548, Stipulation made a part hereof as Exhibit "11").

(j) The affidavit of Mr. Belcher submitted in support of the motion to dismiss this appeal states that said John Egan Belcher "is *one* of the attorneys of record for all state officers sued herein in their official capacities, and individually" (p. 7). But in that affidavit he does not deny that Mr. Schweppe was also authorized to act on behalf of the Attorney General. The fact is, that Mr. Belcher never took any active part in this litigation, and that counsel for appellants at all times believed that the Attorney General had entrusted the active conduct of this litigation to Alfred J. Schweppe, Esq., with whom at all times they dealt as the representative of said Attorney General.

(k) Notwithstanding the fact that the Attorney General of the State of Washington was at all times represented by Mr. Schweppe as aforesaid, a printed copy of the Statement as to Jurisdiction, together with appellants' Reply Brief on the Question of Jurisdiction in this Court was sent to Mr. G. W. Hamilton as soon as the same were received by him from the Clerk of this Court. (Affidavit of Herman Finkelstein annexed hereto as Exhibit "12").

(l) Upon receiving the motion herein, H. W. Haugland, Esq., of Seattle, Washington, one of the local counsel in this case in the court below, was requested by counsel who are conducting this appeal on behalf of appellants, to cause a copy of the petition for appeal, order allowing appeal, citation on appeal and notice under Rule 12, paragraph 2 of the Rules of this Court to be served personally on the said appellee, Honorable G. W. Hamilton. All such papers were served personally on said G. W. Hamilton on October 15, 1938, as appears from the affidavit of said H. W. Haug-

land, verified October 15, 1938, annexed hereto as Exhibit "13". Service of the citation upon the Attorney General, even though late should be regarded as sufficient under the circumstances, if such service was in fact necessary. *Jacobs* v. *George*, 150 U. S. 415, *Lockman* v. *Lang*, 132 Fed. 1 (C. C. A. 8).

(m) Even though the Attorney General's authorization of *Mr. Schweppe* to appear on his behalf did not give Mr. Schweppe a right to demand compensation from the State, nevertheless, he was authorized to and did represent the Attorney General in this litigation, and the Attorney General is bound by everything that Mr. Schweppe did on his behalf, including the acceptance of service of the citation and other papers on appeal herein. *Matter of Attorney General* v. *North Amer. Life Ins. Co.*, 91 N. Y. 57, 66 (1883); *In re Creighton*, 91 Neb. 654, 136 N. W. 1001; *McQuesten* v. *Attorney General*, 187 Mass. 185, 72 N. E. 965; *Edward Hines Yellow Pine Trustees* v. *Knox, Atty. General.*, 144 Miss. 560, 108 So. 907, 912. The case of *State* v. *Gattavara*, 182 Wash. 325, relied on by the Attorney General is not in point, inasmuch as the attorney in that case did not even purport to act on behalf of the Attorney General, and the Attorney General had not authorized him to act on his behalf.

(n) The motion to dismiss in the court below was signed by Mr. Schweppe on behalf of all the defendants, including the Attorney General. A representative of the Attorney General's office was in court when that motion to dismiss was argued, and when the decree granting that motion was entered. Mr. Schweppe's authority to make the motion to dismiss and thus to secure the decree appealed from was not challenged by the Attorney General in the court below. If Mr. Schweppe was authorized to act on the Attorney General's behalf in conducting the proceedings in the court below, he was authorized to act on the Attorney General's behalf in accepting service of the citation herein. *United States* v. *Curry*, 6 How. 106, 111.

9. This matter is of great consequence to appellants. They were diligent in instituting this suit, having brought the same on for hearing on June 29, 1937, within approximately two weeks after the effective date of the Statute. Due notice of the application for interlocutory injunction, together with the complaint and moving papers, were served on all parties, and upon the Governor of the State of Washington seventeen days before the hearing.

10. Prior to the hearing, appellants ceased all operations in the State of Washington, and have not enforced any of their contracts or made any new license agreements or received any payments from that State since that time, although they have in the past derived approximately $60,000 annually from that State (Compl. par. 26-28, Tr. 29-33).

11. Almost a year elapsed before the Court reached its decision dismissing the complaint for lack of jurisdiction. Up to the present time appellants have been deprived of all benefits under their contracts and under the Copyright Law in the State of Washington for the past sixteen months.

12. It is respectfully submitted that the ends of justice will be served by denying the motion of appellee, G. W. Hamilton, to dismiss the appeal herein, and by entering an order dropping the defendants-appellees, Sam M. Driver, John D. Evans and Ernest N. Hutchinson as parties defendant.

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13. The motion of appellee G. W. Hamilton to dismiss the appeal herein should be denied, and an order should be entered dropping the defendants-appellees Sam M. Driver, John D. Evans and Ernest N. Hutchinson, as parties defendant.

THOMAS G. HAIGHT,
LOUIS D. FROHLICH,
HERMAN FINKELSTEIN,
Counsel for Appellants.

October 21, 1938.

Exhibit "1".

NOTICE OF HEARING OF APPLICATION FOR INTERLOCUTORY OR TEMPORARY INJUNCTION FILED IN DISTRICT COURT JUNE 21, 1937

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF WASHINGTON—SOUTHERN DIVISION.

GENE BUCK, individually and as President of the American Society of Composers, Authors and Publishers, CARL FISCHER, INC., G. SCHIRMER, INC., IRVING BERLIN, INC., DEEMS TAYLOR, OLEY SPEAKS, WILLIAM J. HILL, ANNE PAUL NEVIN, ELLA HERBERT BARTLETT and JANE SOUSA,

Complainants,

vs.

OTTO CASE, as State Treasurer of Washington; CLIFF YELLE, as State Auditor of Washington; ERNEST N. HUTCHINSON, as Secretary of the State of Washington; G. W. HAMILTON, as Attorney General for the State of Washington; B. GRAY WARNER, as District Attorney of King County of Washington; HARRY H. JOHNSTON, as District Attorney of Pierce County of Washington; RALPH E. FOLEY, as District Attorney of Spokane County of Washington; A. W. SWANSON, as District Attorney of Snohomish County of Washington; H. W. COVALT, as District Attorney of Whatcom County of Washington; SMITH TROY, as District Attorney of Thurston County of Washington; PAUL O. MANLEY, as District Attorney of Grays Harbor County of Washington; JOHN D. EVANS, as District Attorney of Yakima County of Washington; GLENN L. BEAN, as District Attorney of Walla Walla County of Washington; SAM M. DRIVER, as District Attorney of Chelan County of Washington; "JOHN DOE" and "RICHARD ROE",

Defendants.

In Equity No. 606

To Honorable Clarence D. Martin, as Governor of the State of Washington; Honorable G. W. Hamilton, as Attorney-General of the State of Washington, and to each of the Defendants Named in the Above-Entitled Action:

You, and each of you, are hereby notified that the complainants in the above-entitled cause did, on the 28th day of May, 1937, file in the above-entitled court at Tacoma, Washington, a bill of complaint, supported by affidavit of Gene Buck, praying for a temporary and permanent injunction enjoining and restraining the defendants named in the above-entitled cause, and each of them, from bringing, directly or indirectly, any proceedings at law or in equity for the purpose of enforcing Chapter 218 of the Laws of 1937 of the State of Washington, relating to the use of copyrighted songs and music, against the complainants and others similarly situated, to which bill of complaint and affidavit on file in said cause, reference is hereby made, and that the complainants then moved the Court for a temporary injunction and requested that the same be heard and determined by three Judges, as provided by Section 380, Title 28 of the United States Codes Annotated, as amended.

You and each of you are further notified that the Honorable Edward E. Cushman, one of the United States District Judges for the District of Washington, on June 9, 1937, made an order setting the complainants' application for a temporary injunction in said cause for hearing before the Court at the court room in the Federal Building in the City of Tacoma, Washington, on June 29, 1937, at 10:00 o'clock A.M., before three Judges, consisting of the Honorable Bert Emory Haney, United States Circuit Judge for the Ninth Circuit, San Francisco, California and The Honorable John C. Bowen, United States District Judge for the Western

District of Washington, and The Honorable Edward E. Cushman, United States District Judge for the Western District of Washington, a copy of which order is hereto attached and made a part of this notice.

Dated this 10th day of June, 1937.

VANDERVEER & BASSETT
Attorneys for Complainants

GEORGE F. VANDERVEER
SAMUEL BASSETT

Serv. Accepted
June 12, '37,
E. P. DONNELLY,
Asst. Atty. Gen.

Received for Governor Martin.
By RICHARD HAMILTON
Sec. to the Governor.

June 12, 1937.

Exhibit "2".

ORDER OF JUNE 9, 1937 CONVENING STATUTORY COURT

(Same title as Exhibit "1", and originally annexed thereto.)

It appearing to the Court that Complainants in the above entitled cause have filed a Bill of Complaint alleging that Chapter 218 of the 1937 Laws of the State of Washington, in certain respects, violates provisions of the Constitution of the United States, and

It further appearing that Complainants have moved the Court for a preliminary injunction *pendente lite* restraining the defendants from action pursuant to said provisions of said Act, and

It further appearing that Complainants have moved the Court to convene three judges to hear such application for an interlocutory injunction, and the undersigned judge being duly advised, does hereby call to his assistance to hear and determine the application for an interlocutory injunction in this cause, The Honorable Bert Emory Haney, United States Circuit Judge for the Ninth Circuit, San Francisco, California, and The Honorable John C. Bowen, United States District Judge for the Western District of Washington, the date and place for the convening of the Court for such purpose being hereby fixed as June 29th, 1937 at 10:00 o'clock in the forenoon, or as soon thereafter as counsel can be heard, in the court room of this court in the Federal Building, at Tacoma, Washington.

The Clerk is directed to forthwith mail a copy of this Order to Honorable Bert Emory Haney, United States Circuit Judge, San Francisco, California and Honorable John C. Bowen, United States District Judge, Seattle, Washington and is further directed to mail copies hereof to

Honorable Clarence D. Martin, Governor of the State of Washington and G. W. Hamilton, Attorney General of the State of Washington, at Olympia, Washington and to the attorneys for complainants, and make return of such mailing.

IT IS FURTHER ORDERED that the Complainants forthwith deliver to the Honorable Clarence D. Martin, Governor of the State of Washington and each of the defendants copy of this Order and, if such has not already been done, a copy of their Bill of Complaint and Motion for injunction with supporting affidavits filed herein.

IT IS FURTHER ORDERED that any affidavits in opposition to the granting of said Motion be by the defendants served and filed on or before June 25th, 1937, and that reply affidavits upon Complainants' part, if any, be served on the defendant Attorney General and filed before noon on Monday, June 28th, 1937.

Signed at Tacoma, Washington, this 9th day of June, 1937.

EDWARD E. CUSHMAN,
Judge.

Exhibit "3".

AFFIDAVIT OF SERVICE OF NOTICE, ORDER, COMPLAINT AND MOVING PAPERS ON GOVERNOR ON JUNE 12, 1937.

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1938

GENE BUCK, Individually and as President of the American Society of Composers, Authors and Publishers, *et al.*,
Appellants,

vs.

PHIL H. GALLAGHER, Individually and as State Treasurer of the State of Washington, *et al.*,
Appellees.

STATE OF WASHINGTON
COUNTY OF KING } ss.:

Before me, the undersigned authority, personally appeared H. W. Haugland, who being duly sworn deposes and says: that he is over the age of 21 years, competent to be a witness in the above entitled action, and not a party thereto, and in no wise interested therein.

That on the 12th day of June, 1937, he received a copy of the original Bill of Complaint and of the original Order, Motion and Affidavit for Temporary Injunction in Cause No. 606, in the United States District Court, Western District of Washington, Southern Division, together with Notice of Hearing of Application for Interlocutory or Temporary Injunction and Order of Judge Edward E. Cushman, dated the 9th day of June, 1937; and that on the 12th day of June, 1937, he served the same upon the Honorable Clarence D. Martin, Governor of the State of Washington, in the following manner:

That affiant appeared at the office of the said Governor in the Capitol Building in Olympia, Washington, at the hour of approximately 11:00 A. M.; that affiant was met in the reception room of the Governor's office by one Richard Hamilton, known to affiant to be an attorney and personal secretary to the Governor; that affiant left the said documents with the said Richard Hamilton, and that the said Richard Hamilton accepted the said papers for the said Clarence D. Martin, and that the said Richard Hamilton placed an acceptance of service upon affiant's copy of Notice, which acceptance stated:

"Received for Governor Martin
By Richard Hamilton, Secretary to
the Governor, June 12, 1937"

Affiant further states that he is informed and believes that the Honorable Clarence D. Martin, Governor, has authorized the said Richard Hamilton to accept service of all process, and that the above is the usual and customary practice of making service upon the Honorable Governor of the State of Washington.

(Sgd.) H. W. HAUGLAND
H. W. HAUGLAND

Subscribed and sworn to before me this 17th day of October, 1938.

(Sgd.) JNO J. O'BRIEN,
Notary Public in and for the State of Washington, residing at Seattle.

(Notarial Seal—
JNO. J. O'BRIEN,
State of Washington
Notary Public,
Commission Expires, Sep. 28, 1939.)

Exhibit "4".

NOTICE OF APPEARANCE FILED JUNE 28, 1937

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
SOUTHERN DIVISION

GENE BUCK, individually and as President of the American Society of Composers, Authors and Publishers, CARL FISCHER, INC., G. SCHIRMER, INC., IRVING BERLIN, INC., DEEMS TAYLOR, OLEY SPEAKS, WILLIAM J. HILL, ANNE PAUL NEVIN, ELLA HERBERT BARTLETT and JANE SOUSA,
Complainants,

vs.

PHIL H. GALLAGHER, as State Treasurer of Washington; CLIFF YELLE, as State Auditor of Washington; ERNEST N. HUTCHINSON, as Secretary of the State of Washington; G. W. HAMILTON, as Attorney General for the State of Washington; B. GRAY WARNER, as District Attorney of King County of Washington; HARRY H. JOHNSTON, as District Attorney of Pierce County of Washington; RALPH E. FOLEY, as District Attorney of Spokane County of Washington; A. W. SWANSON, as District Attorney of Snohomish County of Washington; H. W. COVALT, as District Attorney of Whatcom County of Washington; SMITH TROY, as District Attorney of Thurston County of Washington; PAUL O. MANLEY, as District Attorney of Grays Harbor County of Washington; ROBERT J. WILLIS, as District Attorney of Yakima County of Washington; GLENN L. BEAN, as District Attorney of Walla Walla County of Washington; SAM M. DRIVER, as District Attorney of Chelan County of Washington; "JOHN DOE" and "RICHARD ROE",
Defendants.

In Equity Cause No. 606-E Appearance

To the Clerk of the Above Entitled Court:

You will please enter our appearance as Solicitors and Attorneys for the Defendants in the above entitled cause, and service of all subsequent papers, except writs and process, may be made upon said Defendants, by leaving the same with:

(Signed) G. W. Hamilton
G. W. HAMILTON
Attorney General of the State of Washington

(Signed) E. B. Donnelly
E. B. DONNELLY
Assistant Attorney General of the State of Washington

(Signed) B. Gray Warner
B. GRAY WARNER
District Attorney of King County, Washington

(Signed) Edwin C. Ewing
EDWIN C. EWING
First Assistant District Attorney of King County, Washington

(Signed) Harry H. Johnston
HARRY H. JOHNSTON
District Attorney of Pierce County, Washington

(Signed) Ralph E. Foley
RALPH E. FOLEY
District Attorney of Spokane County, Washington

(Signed) A. W. Swanson
A. W. SWANSON
District Attorney of Snohomish County, Washington

(Signed) H. W. Covalt
H. W. COVALT
District Attorney of Whatcom County, Washington

(Signed) Smith Troy
SMITH TROY
District Attorney of Thurston County, Washington

(Signed) Paul O. Manley
PAUL O. MANLEY
District Attorney of Grays Harbor County, Washington

(Signed) Robert J. Willis
ROBERT J. WILLIS
District Attorney of Yakima County, Washington

(Signed) Glenn L. Bean
GLENN L. BEAN
District Attorney of Walla Walla County, Washington

(Signed) Alfred J. Schweppe
ALFRED J. SCHWEPPE
Seattle, Washington

(Signed) McMicken, Rupp & Schweppe
MCMICKEN, RUPP & SCHWEPPE
Seattle, Washington
Solicitors and Attorneys for the Defendants.

Exhibit "5".

DEFENDANTS' MOTION TO DISMISS FILED IN DISTRICT COURT JUNE 25, 1937

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
SOUTHERN DIVISION

GENE BUCK, individually and as President of the American Society of Composers, Authors and Publishers, CARL FISCHER, INC., G. SCHIRMER, INC., IRVING BERLIN, INC., DEEMS TAYLOR, OLEY SPEAKS, WILLIAM J. HILL, ANNE PAUL NEVIN, ELLA HERBERT BARTLETT and JANE SOUSA, *Complainants*,

vs.

PHIL H. GALLAGHER, as State Treasurer of Washington; CLIFF YELLE, as State Auditor of Washington; ERNEST N. HUTCHINSON, as Secretary of the State of Washington; G. W. HAMILTON, as Attorney General for the State of Washington; B. GRAY WARNER, as District Attorney of King County of Washington; HARRY H. JOHNSTON, as District Attorney of Pierce County of Washington; RALPH E. FOLEY, as District Attorney of Spokane County of Washington; A. W. SWANSON, as District Attorney of Snohomish County of Washington; H. W. COVALT, as District Attorney of Whatcom County of Washington; SMITH TROY, as District Attorney of Thurston County of Washington; PAUL O. MANLEY, as District Attorney of Grays Harbor County of Washington; JOHN D. EVANS, as District Attorney of Yakima County of Washington; GLENN L. BEAN, as District Attorney of Walla Walla County of Washington; SAM M. DRIVER, as District Attorney of Chelan County of Washington; "JOHN DOE" and

In Equity Cause No. 606

MOTION TO DISMISS ON BEHALF OF DEFENDANTS.

Come now the defendants in the above entitled cause, and jointly and severally move this court to dismiss the Bill of Complaint, upon the grounds and for the reasons stated herein, and upon the facts appearing upon the face of said bill and *dehors* said bill, as hereinafter more particularly set forth, to wit:

I.

That this case does not really and substantially involve a dispute or controversy properly within the jurisdiction of this court, in that the amount or value of the subject matter in dispute does not exceed the sum of three thousand dollars ($3,000.00), exclusive of interest and costs, and that in this regard, it, among other things, more particularly appears:

1. That the individual complainants are exempt from the operation of the act (Section 3—See Exhibit "E", Bill of Complaint, page 75).

2. That the complainant, American Society of Composers, Authors and Publishers, is "a voluntary, unincorporated, non-profit corporation" (Bill of Complaint, page 19) and will suffer no loss in complying with the act.

3. That complainants cannot aggregate the amounts in controversy in order to secure the requisite jurisdictional amount.

4. That the act (Section 4—Bill of Complaint, page 75) does not require any filing or license fee to be paid by complainants, or any of them.

5. That the act (Section 2—Bill of Complaint, page 74) imposes a criminal penalty for the use of the copyrighted compositions, or any of them, belonging to the complainants, or any of them, without the consent of the owner thereof;

that this provision is itself a restrainer against unauthorized use of copyrighted works, and that hence complainants have adequate protection against any monetary loss in that regard.

6. That the only immediate requirement of the act is that the persons within the class regulated file in the office of the Secretary of State of the State of Washington a list of their copyrighted works, together with a list of prices for their various copyrighted works (Section 2—Bill of Complaint, page 75), without any filing fee being required for so doing.

7. That the act does not attempt to prevent complainants from doing business; and that the Bill fails to set forth any facts showing what, if any, curtailment of business and consequent loss the enforcement of the statute will involve.

II.

That the court is without jurisdiction, in that no substantial Federal question is presented by the Bill of Complaint.

III.

That there is a misjoinder of parties plaintiff, to wit: that each of said complainants, Carl Fischer, Inc., G. Schirmer, Inc., Irving Berlin, Inc., Deems Taylor, Oley Speaks, William J. Hill, Anne Paul Nevin, Ella Herbert Bartlett and Jane Sousa, as shown by Exhibits "A", "B", "C", "D" and "E" attached to the Complaint, have heretofore executed valid assignments of their entire repertoire of copyrights to the American Society of Composers, Authors and Publishers, and do not now have a sufficient interest to be properly joined as parties plaintiff in this action, and that the statute involved expressly exempts complainants, as individuals, from its operation.

IV.

That said Bill of Complaint does not state any matter of equity entitling complainants to the relief prayed for, nor are the facts as stated sufficient to entitle complainants to any relief in equity against these defendants, or any of them, and that in this regard, it, among other things, appears:

1. That the individual complainants have an insufficient interest to entitle them personally to the extraordinary relief by injunction.

2. That no action is maintainable on behalf of American Society of Composers, Authors and Publishers, because the case does not fall within the New York statute giving such associations a right to sue by its president in certain cases.

3. That complainants have a plain, speedy and adequate remedy at law, in that

(a) Complainants can adequately interpose a defense to any criminal proceeding brought under the act (Section 11—Bill of Complaint, page 81), and such right of defense is an adequate remedy at law; and

(b) That complainants can adequately interpose their defense in any injunction suit brought by any prosecutor under Section 9 of the act (Bill of Complaint, page 78), it being specifically provided in Section 10, Bill of Complaint, page 80, that no right of any person shall be affected in the state courts "without full and complete due process of law."

4. That defendants assert that they do not intend to enforce the criminal penalties of the act until the validity of the act is adjudged.

5. That there is no sufficient allegation that complainants have not complied or cannot comply with the statute, or that they have made any attempt to comply.

6. That Section 2 of the Act, Bill of Complaint, page 74, contains an effective prohibition or injunction in complainants' favor, in that any one using any of complainants' copyrights without the consent of the owner, becomes subject to the criminal penalties of the act. (Section 11—Bill of Complaint, page 81); that there is no allegation that complainants' copyrights are being illegally used in Washington, or that the appropriate public officials arbitrarily refused to prosecute such illegal use.

7. That mere unconstitutionality, even assuming it to exist, does not warrant injunctive relief, but that the facts alleged must bring the case within the recognized rules of equity relating to injunctions, and that complainants have not done so.

8. That said statute, in so far as any question now justiciable is concerned, is a valid exercise of the police power of the State of Washington.

WHEREFORE, the defendants and each of them pray that the Bill of Complaint filed in this cause be dismissed, with costs to the defendants.

G. W. HAMILTON
G. W. Hamilton
Attorney General of the State of Washington.

E. W. DONNELLY,
E. W. Donnelly
Assistant Attorney General of the State of Washington

B. GRAY WARNER
B. Gray Warner
District Attorney of King County, Washington

EDWIN C. EWING
Edwin C. Ewing
First Assistant District Attorney of
King County, Washington

HARRY H. JOHNSTON
Harry H. Johnston
District Attorney of Pierce County,
Washington

RALPH E. FOLEY
Ralph E. Foley
District Attorney of Spokane County,
Washington

A. W. SWANSON,
A. W. Swanson
District Attorney of Snohomish County,
Washington

H. W. COVALT
H. W. Covalt
District Attorney of Whatcom County,
Washington

SMITH TROY
Smith Troy
District Attorney of Thurston County,
Washington

PAUL O. MANLEY
Paul O. Manley
District Attorney of Grays Harbor County
Washington

JOHN D. EVANS
John D. Evans
District Attorney of Yakima County,
Washington

GLENN L. BEAN,
Glenn L. Bean
District Attorney of Walla Walla County,
Washington

ALFRED J. SCHWEPPE
Alfred J. Schweppe
Seattle, Washington

McMICKEN, RUPP & SCHWEPPE
McMicken, Rupp & Schweppe
Seattle, Washington
Solicitors and Attorneys for the Defendants

COPY RECEIVED
June 21, 1937

VANDERVEER & BASSETT
Attorneys for Compl

Exhibit "6".

NOTICE UNDER RULE 12 AND ACKNOWLEDGMENT OF SERVICE

(Filed in District Court August 5, 1938)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1938

GENE BUCK, individually and as President of the American Society of Composers, Authors and Publishers, CARL FISCHER, INC., G. SCHIRMER, INC., IRVING BERLIN, INC., DEEMS TAYLOR, CLEY SPEAKS, WILLIAM J. HILL, ANNE PAUL NEVIN, ELLA HERBERT BARTLETT and JANE SOUSA, *Appellants,*

against

PHIL GALLAGHER, as State Treasurer of Washington, sued herein as "John Doe"; CLIFF YELLE, as State Auditor of Washington; ERNEST N. HUTCHINSON, as Secretary of the State of Washington; G. W. HAMILTON, as Attorney General for the State of Washington; B. GRAY WARNER, as District Attorney of King County of Washington; HARRY H. JOHNSTON, as District Attorney of Pierce County of Washington; RALPH E. FOLEY, as District Attorney of Spokane County of Washington; A. W. SWANSON, as District Attorney of Snohomish County of Washington; H. W. COVALT, as District Attorney of Whatcom County of Washington; SMITH TROY, as District Attorney of Thurston County of Washington; PAUL O. MANLEY, as District Attorney of Grays Harbor County of Washington; JOHN D. EVANS, as District Attorney of Yakima County of Washington; GLENN L. BEAN, as District Attorney of Walla Walla County of Washington; SAM M. DRIVER, as District Attorney of Chelan County of Washington; K. M. O. INC., a corporation; JOHN G. LOCKHART, *Appellees.*

Pursuant to Rule 12, paragraph 2, Rules of the Supreme Court of the United States, you are hereby served with copies of the petition for appeal, order allowing appeal, assignments of error, and statement as to jurisdiction in the above entitled cause.

Your attention is directed to the provisions of Rule 12, paragraph 3, copied in the margin.

[Signed] THOMAS G. HAIGHT
Thomas G. Haight

[Signed] LOUIS D. FROHLICH
Louis D. Frohlich

[Signed] HERMAN FINKELSTEIN
Herman Finkelstein

[Signed] H. W. HAUGLAND
H. W. Haugland
903-905 Arctic Building
Seattle, Washington
Counsel for Appellants.

Service acknowledged this 4 day of August, 1938.

[Signed] ALFRED J. SCHWEPPE
Counsel for Appellees Cliff Yelle, as State Auditor of Washington; Ernest N. Hutchinson, as Secretary of the State of Washington; G. W. Hamilton, as Attorney General for the State of Washington; B. Gray Warner, as District Attorney of King County of Washington; Harry H. Johnston, as District Attorney of Pierce County of Washington; Ralph E. Foley, as District Attorney of Spokane County of Washington; A. W. Swanson, as District Attorney of Snohomish County

of Washington; H. W. Covalt, as District Attorney of Whatcom County of Washington; Smith Troy, as District Attorney of Thurston County of Washington; Paul O. Manley, as District Attorney of Grays Harbor County of Washington; John D. Evans, as District Attorney of Yakima County of Washington; Glenn L. Bean, as District Attorney of Walla Walla County of Washington; Sam M. Driver, as District Attorney of Chelan County of Washington; Phil H. Gallagher, sued herein as "John Doe".

[Signed] C. C. DILL
KENNETH DAVIS
LEO TEATS
by Leo Teats
Counsel for Appellee K. M. O. Inc.

[Signed] CLARK R. BELKNAP
Counsel for Appellee John G. Lockhart.

Rule 12, paragraph 3:

"Within 15 days after such service the appellee may file with the clerk of the court possessed of the record, and serve upon the appellant, a typewritten statement disclosing any matter or ground making against the jurisdiction of this court asserted by the appellant. There may be included in, or filed with, such opposing statement, a motion by appellee to dismiss or affirm. Where such a motion is made, it may be opposed as provided in Rule 7, paragraph 3."

Exhibit "7".

APPELLEES' ANSWER TO APPELLANTS' STATEMENT AS TO JURISDICTION

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1938

GENE BUCK, individually and as President of The American Society of Composers, Authors and Publishers, CARL FISCHER, INC., G. SCHIRMER, INC., IRVING BERLIN, INC., DEEMS TAYLOR, OLEY SPEAKS, WILLIAM J. HILL, ANNE PAUL NEVIN, ELLA HERBERT BARTLETT and JANE SOUSA, *Appellants*,

vs.

PHIL GALLAGHER, as State Treasurer of Washington; CLIFF YELLE, as State Auditor of Washington; ERNEST N. HUTCHINSON, as Secretary of the State of Washington; G. W. HAMILTON, as Attorney General for the State of Washington; B. GRAY WARNER, as District Attorney of King County of Washington; HARRY H. JOHNSTON, as District Attorney of Pierce County of Washington; RALPH E. FOLEY, as District Attorney of Spokane County of Washington; A. W. SWANSON, as District Attorney of Snohomish County of Washington; H. W. COVALT, as District Attorney of Whatcom County of Washington; SMITH TROY, as District Attorney of Thurston County of Washington; PAUL O. MANLEY, as District Attorney of Grays Harbor County of Washington; JOHN D. EVANS, as District Attorney of Yakima County of Washington; GLENN L. BEAN, as District Attorney of Walla Walla County of Washington; SAM M. DRIVER, as District Attorney of Chelan County of Washington; K. M. O. INC., a corporation; JOHN G. LOCKHART, *Appellees.*

A direct appeal to this Court does not lie from the judgment of the District Court dismissing appellants' bill of complaint on the ground of lack of jurisdiction.

The appellants have appealed directly to this court from the decree of dismissal entered on June 28, 1938, in reliance upon the provisions of Section 266 of the Judicial Code, granting a direct appeal to the Supreme Court from an order of a three-judge statutory court granting or denying, after a hearing on the application therefor, an interlocutory order suspending or restraining the enforcement, operation or execution of any statute of a state.

The provisions of Section 266 permitting a direct appeal do not apply to this case. The findings of fact, conclusions of law and decree entered by the three-judge court dismissed the bill of complaint solely on the jurisdictional ground that the appellants have failed to show that the requisite amount was in controversy. The hearings held by the three judges were devoted to arguments on the preliminary question of jurisdiction raised by the appellees' motion to dismiss the bill of complaint. The bill of complaint having been dismissed for lack of jurisdiction, the determination of which was necessarily preliminary to any action of the court upon appellants' application, the three judges never functioned as a statutory three-judge court. The fact that the decree incidentally recites that the interlocutory injunction is denied cannot affect the fact that the sole determination of the case made by the court was upon a jurisdictional ground.

A three-judge court has a purely statutory existence. Its jurisdiction can be invoked only for the specific purpose of passing upon an application for an interlocutory injunction restraining the enforcement of a state statute. The purpose of Section 266 in permitting a direct appeal from the decision of a three-judge court, after a hearing on the application for an interlocutory injunction, is to permit a speedy de-

termination by the court of last resort in the important class of cases involving the validity and enforcement of a state statute.

Stratton v. *St. Louis S. W. Ry.*, 282 U. S. 10, 14.

This court has held that the provisions of Section 266, requiring the presence of a three-judge court, necessarily assume that the District Court has jurisdiction. The preliminary question as to jurisdiction of a three-judge court need not be determined by the three judges, but may be determined by a single district judge.

Ex parte Poresky, 290 U. S. 30, 31, 32.

Where, as in the instant case, either a district judge or the three judges determine, in advance of any determination of the merits of complainant's application for an interlocutory injunction, that the court lacks jurisdiction, and dismiss the bill of complaint for that reason, the three-judge court, even though called, has never functioned for the purpose provided in Section 266, and hence the provisions for a direct appeal have no application.

This court has repeatedly held that when it has been determined, either by a district judge, sitting alone, or by three judges, that the complainant has failed to show grounds sufficient to invoke the jurisdiction of a three-judge court under Section 266, then, even though the three-judge court may have been properly convened, its action is no longer prescribed, and no direct appeal to the Supreme Court lies from the decision denying, for lack of jurisdiction, a hearing before the three-judge court.

Oklahoma Gas & Electric Co. v. *Oklahoma Packing Co.*, 292 U. S. 386;

California Water Service Co. v. *City of Redding*, 58 Sup. Ct. Rep. 865;

Ex parte Buder, 271 U. S. 461;
Gully v. *Interstate Natural Gas Co.*, 292 U. S. 16;
Ex parte Poresky, 290 U. S. 30.

Here, there has been a determination that the appellants' bill of complaint fails to establish jurisdiction in either the three-judge or any other federal court to hear the application for an interlocutory injunction. Under the rule determined by this court in the cases cited above, the court's decision being on a jurisdictional ground, appellants may not take an appeal direct to this court.

The major part of appellants' statement as to jurisdiction is not addressed to the question of the jurisdiction of this court, but is devoted to the merits of the appeal. We reserve our answer to these arguments until the appropriate time after this court has determined whether or not it has jurisdiction of the appeal.

Respectfully submitted,

B. GRAY WARNER
District Attorney of King County, Washington

EDWIN C. EWING
First Assistant District Attorney of King County, Washington

HARRY H. JOHNSTON
District Attorney of Pierce County, Wash.

RALPH E. FOLEY
District Attorney of Spokane County, Wash.

A. W. SWANSON
District Attorney of Snohomish County, Washington

H. W. COVALT
District Attorney of Whatcom County, Wash.

SMITH TROY
District Attorney of Thurston County, Wash.

PAUL O. MANLEY
District Attorney of Grays Harbor County, Washington

JOHN D. EVANS
District Attorney of Yakima County, Wash.

GLENN L. BEAN
District Attorney of Walla Walla County, Washington

SAM M. DRIVER
District Attorney of Chelan County, Wash.

ALFRED J. SCHEPPE
Seattle, Wash.

McMICKEN RUPP & SCHWEPPE
Seattle, Washington

Solicitors and Attorneys for Appellees.

Exhibit "8".

CITATION ON APPEAL (Filed August 1, 1938)

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
SOUTHERN DIVISION

GENE BUCK, individually and as President of the American Society of Composers, Authors and Publishers, CARL FISCHER, INC., G. SCHIRMER, INC., IRVING BERLIN, INC., DEEMS TAYLOR, OLEY SPEAKS, WILLIAM J. HILL, ANNE PAUL NEVIN, ELLA HERBERT BARTLETT and JANE SOUSA, *Complainants,*

vs.

OTTO CASE, as State Treasurer of Washington; CLIFFORD YELLE, as State Auditor; ERNEST N. HUTCHINSON, as Secretary of State; G. W. HAMILTON, as Attorney General; B. GRAY WARNER, as District Attorney of King County; HARRY H. JOHNSTON, as District Attorney of Pierce County; RALPH E. FOLEY, as District Attorney of Spokane County; A. W. SWANSON, as District Attorney of Snohomish County; H. W. COVALT, as District Attorney of Whatcom County; SMITH TROY, as District Attorney of Thurston County; PAUL O. MANLEY, as District Attorney of Grays Harbor County; JOHN D. EVANS, as District Attorney of Yakima County; GLENN L. BEAN, as District Attorney of Walla Walla County; SAM M. DRIVER, as District Attorney of Chelan County; PHIL H. GALLAGHER, as State Treasurer of Washington, sued herein as JOHN DOE, and RICHARD ROE, *Defendants,*

K. M. O. INC., a corporation,
Intervening Defendant,

JOHN G. LOCKHART,
Intervening Defendant.

In Equity No. 606

Citation on Appeal.

United States of America

To Phil H. Gallagher, individually and as State Treasurer of the State of Washington (sued herein as "John Doe") Cliff Yelle, individually and as State Auditor of the State of Washington; Ernest N. Hutchinson, individually and as Secretary of the State of Washington; G. W. Hamilton, individually and as Attorney General for the State of Washington; B. Gray Warner, individually and as District Attorney of King County of Washington; Harry H. Johnston, individually and as District Attorney of Pierce County of Washington; Ralph E. Foley, individually and as District Attorney of Spokane County of Washington; A. W. Swanson, individually and as District Attorney of Snohomish County of Washington; H. W. Covalt, individually and as District Attorney of Whatcom County of Washington; Smith Troy, individually and as District Attorney of Thurston County of Washington; Paul O. Manley, individually and as District Attorney of Grays Harbor County of Washington; John D. Evans, individually and as District Attorney of Yakima County of Washington; Glenn L. Bean, individually and as District Attorney of Walla Walla County of Washington; Sam M. Driver, individually and as District Attorney of Chelan County of Washington; K. M. O. Inc., a corporation, and John G. Lockhart,

Greeting:

You are hereby cited and admonished to appear in the Supreme Court of the United States, City of Washington, District of Columbia, within forty days from the date hereof, pursuant to an order allowing an appeal from the District Court of the United States for the Western District of Washington, Southern Division, from a decree dated

June 28, 1938, denying complainants' motion for an interlocutory injunction and dismissing the Bill of Complaint as not being within the jurisdiction of the above entitled court as a Federal Court, and from an order dated June 28, 1938, denying complainants' application to take additional testimony in the suit wherein you are defendants (K. M. O. Inc., and John G. Lockhart being intervening defendants), and Gene Buck, individually and as President of the American Society of Composers, Authors and Publishers; Carl Fischer, Inc., a corporation; G. Schirmer, Inc., a corporation; Irving Berlin, Inc., a corporation; Deems Taylor, Oley Speaks, William J. Hill, Anne Paul Nevin, Ella Herbert Bartlett and Jane Sousa are complainants, to show cause, if any there be, why the decree and order appealed from should not be corrected, and why speedy justice should not be done in that behalf.

Given under my hand at Tacoma, Washington, in the district above named; this 1st day of Aug., 1938.

EDWARD E. CUSHMAN
United States District Judge.

Exhibit "9".

TRANSCRIPT OF HEARING, FEBRUARY 9, 1938

IN THE

UNITED STATES DISTRICT COURT,

WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION.

RECORD OF PROCEEDINGS:

At a session of a statutory three-judge Court, convened pursuant to Section 266 of the Judicial Code (28 U. S. Code, Sec. 380), held at Seattle, Washington, on the 9th day of February, 1938, the Honorable Bert Emory Haney, Circuit Judge, the Honorable Edward E. Cushman and John C. Bowen, District Judges, sitting en banc, among other proceedings had were the following, truly taken and correctly copied from the Journal Record of said Court, as follows:

GENE BUCK, etc. *et al.*,
Complainants,

vs.

OTTO CASE, as State Treasurer, *et al.*,
Defendants.

Record of Hearing No. 606

Present: The Honorable Bert Emory Haney, Circuit Judge, the Honorable Judges Edward E. Cushman and John C. Bowen, District Judges. Solicitors Clark R. Belknap, *Alfred J. Schweppe* and George F. Vanderveer are present.

The Court, having heretofore taken the above entitled case under advisement, now announces from the bench to such counsel as are present, that it now invites additional briefs on two questions: (a) the value of the right to be measured by the $3,000 limit, and (b) where that value may be found in the record. Any and all of such briefs are to be filed within twenty days from this date. The Clerk is directed to notify all counsel so that if any are not now present they may have opportunity to file such briefs. A memorandum on the requested briefs is filed by the Court at the request of *Mr. Schweppe.*

Exhibit "10".

AFFIDAVIT OF SERVICE OF PAPERS ON APPEAL

Filed August 5, 1938

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF WASHINGTON—SOUTHERN DIVISION

GENE BUCK, individually and as President of The American Society of Composers, Authors and Publishers, *et al.*, *Complainants,*

vs.

OTTO CASE, as State Treasurer of Washington, *et al.*, *Defendants,*

K. M. O. INC., a corporation, *Intervening Defendant,*

JOHN G. LOCKHART, *Intervening Defendant.*

In Equity No. 606. Affidavit of Service

STATE OF WASHINGTON
COUNTY OF } ss.:

BEFORE ME, the undersigned authority, personally appeared HERBERT W. HAUGLAND, Counsel for Complainants, who being first duly sworn deposes and says, that he did on the 4th day of August A. D. 1938, serve on: ALFRED J. SCHWEPPE personally in Seattle, Washington, Attorneys for Defendants in the above entitled cause, and upon Leo Teats, personally in Tacoma, Wash., one of the joint Attorneys for

Intervening Defendant, K. M. O. INC., and on Clark R. Belknap personally in Seattle, Wash., Attorney for Intervening Defendant, JOHN G. LOCKHART, in the above entitled cause, copies of the following papers, to-wit:

Petition for Appeal.
Order allowing appeal.
Appeal Bond and approval thereof by Judge.
Assignment of Errors.
Statement as to Jurisdiction.
Statement directing attention of Appellees to the provisions of Paragraph 3 of Rule 12 of the Rules of the Supreme Court of the United States.

And

Citation on Appeal.
Praecipe to Clerk.

H. W. HAUGLAND
Counsel for Complainants

Sworn to and subscribed before me this
the 5th day of August, 1938.

JOSEPH A. SWEENEY
Notary Public

(SEAL)

Exhibit "11".

STIPULATION AS TO RECORD ON APPEAL FILED AUGUST 11, 1938.

(Same Title as Ex. "10")

IT IS HEREBY STIPULATED by and between the attorneys for the respective parties hereto that the material portions of the transcript of the proceedings on the motion for interlocutory motion is hereto annexed and marked Schedule "A", and that the annexed Schedule shall be transmitted by the Clerk of this Court to the Clerk of the United States Supreme Court, in full compliance with Item 13 of the praecipe herein.

IT IS FURTHER STIPULATED that in transmitting the transcript of the hearing held on June 28, 1938 (Item 19 of the praecipe), the Clerk of this Court shall delete therefrom the following:

p. 3—from the word "There" on line 2 to the word "morning" on line 3, inclusive;

p. 3—from the word "There" on line 6 to the word "heard" on line 30, inclusive;

p. 3—from the word "I" on line 31 to the word "involved" on line 32, inclusive;

p. 11—all of lines 30 and 31 and the first three words of line 32;

p. 15—lines 8 and 9 and the first two words of line 10;

p. 16—lines 7 and 8 and the first two words of line 9;

p. 17—lines 17 and 18;

and that the transcript as so amended contains the material portions of the hearing held on June 28, 1938.

IT IS FURTHER STIPULATED that the figures "1939" on the next to last line on p. 21 of the bill of complaint shall be changed to read "1940", and that the figures "1939" on the 16th line of par. THIRTY-SIXTH on p. 41 of the bill of complaint shall be changed to read "1940".

IT IS FURTHER STIPULATED that the number "35-a" be inserted at the beginning of the paragraph commencing in the middle of p. 38 of the bill of complaint.

Dated, Seattle, Washington, August 11th, 1938.

H. W. HAUGLAND,
Counsel for Complainants-Appellants

ALFRED J. SCHWEPPE,
McMICKEN, RUPP & SCHWEPPE,
Counsel for Defendants-Appellees

TEATS AND TEATS,
Counsel for Intervening Defendant-Appellee K. M. O., Inc.

CLARK R. BELKNAP,
Counsel for Intervening Defendant-Appellee John G. Lockhart.

(Clerk's Note: For Schedule "A" see Item 13 of Praecipe.)

Exhibit "12".

AFFIDAVIT OF SERVICE OF APPELLANTS' JURISDICTIONAL STATEMENT AND REPLY BRIEF ON ATTORNEY GENERAL.

(Same Title as Ex. "3".)

STATE OF NEW YORK,
COUNTY OF NEW YORK, } ss.:

HERMAN FINKELSTEIN, being duly sworn, deposes and says:

That he is one of the counsel for appellants in this case; that on September 21, 1938 he served on G. W. Hamilton, one of the Defendants-Appellees in the above entitled cause, a copy of the following papers, to wit:

Appellants' Statement as to Jurisdiction, and

Appellants' Reply Brief on Question of Jurisdiction,

by depositing a true copy of the same securely enclosed in a post-paid wrapper in a post office box regularly maintained by the United States Government at 1450 Broadway, in the City of New York, State of New York, directed to said G. W. Hamilton, Attorney General, Tacoma, Washington. Such papers were accompanied by a letter addressed to said G. W. Hamilton, of which the following is a true and correct copy:

"September 21, 1938.

Hon. G. W. Hamilton,
Attorney General,
Tacoma, Washington.

Dear Mr. Hamilton: *Re Buck* v. *Gallagher.*

I am sending you a printed copy of Appellants' Statement as to Jurisdiction and Appellants' Reply Brief on Question of Jurisdiction in the above matter, which have already been served on Mr. Schweppe.

These papers are sent for your convenience.

Very truly yours,

HERMAN FINKELSTEIN.

HF:MK
Enclosures (2)"

[signed] HERMAN FINKELSTEIN.

Sworn to before me this 21st day of September, 1938.

BELLE G. BALATOW,
Notary Public, Queens Co.

Exhibit "13".

AFFIDAVIT OF SERVICE OF CITATION ON APPEAL AND OTHER PAPERS ON APPELLEE ATTORNEY GENERAL,

October 15, 1938

(Same Title as Exhibit "3")

STATE OF WASHINGTON }
COUNTY OF KING } ss.:

Before me, the undersigned authority, personally appeared H. W. Haugland, who being duly sworn deposes and says: that he is over the age of 21 years; that on the 15th day of October, 1938, he did serve personally on G. W. Hamilton, one of the defendants-appellees in the above entitled cause, at Attorney General's Office, in the City of Olympia, State of Washington, copies of the following papers, to wit:

Citation on Appeal;
Petition for Appeal;
Order Allowing Appeal;
Assignment of Errors;
Statement Directing Attention of Appellees to the Provisions of Paragraph 3 of Rule 12 of the Rules of the Supreme Court of the United States,

by delivering the same to him personally.

Deponent further says that he knew the person served as aforesaid to be the said G. W. Hamilton.

H. W. HAUGLAND

Sworn to before me this 15th day of October, 1938.

JOSEPH A. SWEENEY

[Notarial Seal]